IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M. CHOCKALINGAM

SECOND APPEAL NO.1046 OF 1993

Seeniammal .. Appellant

-Vs-

1. Kannan alias Rajagopalswami
Naicker
2. Venkitammal .. Respondents

This second appeal is preferred under Section 100 of CPC against the judgment and decree of the learned Subordinate Judge, Srivilliputhur made in AS No.35 of 1989 dated 16.7.1992 setting aside the decree and judgment dated 29.4.1988 in OS No.596 of 1985 on the file of the learned Principal District Munsif, Srivilliputhur.

!For Appellant : Mr.M.Munir Sheriff

^For Respondents: Mr.T.Srinivasa Raghavan

:JUDGMENT

The plaintiff, in a suit for declaration of title and recovery of possession of the plaint schedule mentioned properties, aggrieved over the reversal of the judgment by the first appellate court, has brought forth this second appeal.
2. The following short facts are noticed in the pleadings of the parties.
The property described in Schedule 'A' herein is the Eastern part of the property described in Schedule 'B' herein situated in Rajunaickenpatti, Mallipudur. 'B' schedule came to be owned jointly by the first defendant and her sister one Veerammal by virtue of provision in a registered deed of partition dated 1.9.1945. Veerammal and the first defendant divided the said property orally and thereafter the eastern moiety of B schedule property became the exclusive property of Veerammal and the western part of B schedule property became the exclusive property of the first defendant. On 8.10.1973, Veerammal settled the eastern moiety of the property described in schedule B in favour of the plaintiff by way of a registered deed of settlement. The

said eastern part of B schedule is separately described in schedule A and is the subject matter of the suit. The plaintiff is in enjoyment of the property by paying property tax on the A schedule property. The first defendant has executed registered deed of sale in favour of the second defendant on 22.11.1985 conveying D.No.80 to the second defendant. The correct eastern boundary for D.No.80 should be the plaintiff's property, but the document wrongly mentions eastern boundary as street. Taking advantage of the wrong western and eastern boundary recitals for D.No.80 conveyed under sale deed dated 22.11.1985 in his favour, the second defendant has been attempting to take forcible possession of the plaintiff's property described in Schedule A. Hence, there arose a necessity for filing the suit for declaration and to restrain the second defendant from interfering in the plaintiff's peaceful possession and enjoyment of the property, in question.

3. The defendants resisted the suit stating that the plaintiff's case is a false one; that it is an admitted position that the first defendant Venkittammal and Veerammal are sisters; that the first defendant and Veerammal, on the death of their parents, divided the suit property orally; that the suit property was allotted to the first defendant prior to 3.3.1972; that the first defendant on 22.11.1985 executed a sale deed in favour of the second defendant; that the suit property was in possession of the second defendant; that the defendants present Door number is 79; that at the time of execution of the sale deed, the door number is 80; that it is not correct to state that the present door number of the suit property is 56; that the defendant has perfected title by adverse possession and that the suit has got to be dismissed.

4. The trial court framed necessary issues, tried the suit and decreed the same. Aggrieved, the defendants took it on appeal, wherein the first appellant court reversed the judgment of the trial court and dismissed the suit. Aggrieved, the plaintiff has brought forth this second appeal.

5. At the time of admission, the following substantial questions of law were formulated by this Court for consideration:

1) Whether the lower appellate court was justified in relying upon the alleged lease deed dated 3.3.1972 which is an unregistered one and written on stamp papers of 1971 standing in the name of a Match factory at Sivakasi which has nothing to do with the Lessor or Lessee?

2) Whether the lower appellate court was justified in relying and acting upon the interested parole evidence of D.Ws.1 and 2 ignoring and overlooking the documentary evidence adduced by the appellant/ plaintiff which is in conformity with the oral evidence of P.Ws.1,2 and 3?

3) Whether the Lower appellate court was justified in holding that the house bearing Door No.80 is the same as the house bearing Door No.56 merely on the basis of the wrong description of the boundaries given in the sale deed dated 22.11.1985 without throwing the burden of proof on the 2nd respondent?

6. This Court has heard the learned counsel for the appellant and the respondents.

7. Admittedly, the suit property shown in 'B' schedule to the property belonged to one Kuruvammal and others. There was a partition among the owners, in which Kuruvammal was allotted to the suit properties. Kuruvammal had two daughters, namely, Veerammal and Venkittammal. Kuruvmmal without making any arrangement in respect of the properties died and on her death, there was an oral partition between Veerammal and Venkittammal. In the

oral partition, the eastern part was allotted to Veerammal, while the Western part of the property was allotted to Venkittammal. From the available evidence, it would abundantly clear that Veerammal settled her property, which is situated on the east and which is also described in 'A' schedule to the plaint, in favour of her daughter, the plaintiff in the suit under Ex.A.1 settlement deed and the settlement deed was acted upon. The plaintiff took possession of the property and the same was assigned separate door No.56. In order to prove the possession and enjoyment of the plaintiff, the plaintiff has relied on Exs.A.2,3,4 and 6, the tax receipts paid in respect of the property. It is also not in controversy that the western part of 'B' schedule was allotted to Venkittammal in the oral partition between the first defendant Venkittammal and her sister Veerammal and the original Door number is 80. The first defendant has executed a sale deed in favour of the second defendant on 22.11.1985 under Ex. A.5.

8. Now, the case of the plaintiff seeking for the said relief was that taking advantage of the mistaken boundary description under Ex.A.5 dated 22.11.1985, the defendants were making unlawful claiming over the property of the plaintiff situated on the eastern part and the specific door number of the property is 56. The defendants were attempting to interfere into the peaceful possession and enjoyment of the plaintiff. As pointed out earlier, the original owner of the property was Kuruvammal and subsequently, the property was devolved upon her two daughters, namely, Veerammal and Venkittammal and there was an oral partition between the parties and the eastern part of the property came to the hands of Veerammal, who executed settlement deed in favour of her daughter plaintiff under Ex.A.1 are all admitted facts. In order to prove the possession of the plaint 'A' schedule property, which came to the hands of the plaintiff under Ex.A.1 settlement deed, the plaintiff has produced number of tax receipts. At this juncture, it remains to be stated that though the defendants denied the title of the plaintiff to the suit property, have not proved that the second defendant was in possession of the

property pursuant to Ex.A.5 sale deed. Though Venkittammal was shown as first defendant, she has not examined herself as witness nor the second defendant had taken any steps to examine the first defendant as witness.

9. The Advocate Commissioner, who was appointed by the court, has also inspected the property and has filed his report. He has also pointed out that in between the two properties, there was a wall and there was a door frame also. He has also pointed out that the persons, who are occupying the western part by using the door, could enter into the eastern part and enjoy the same. The case of the plaintiff, seeking for recovery of possession, is that pending suit, the second defendant got into possession of the property illegally, and hence, it became necessary that he should be evicted. Insofar the plaintiff's case, though the plaintiff projected the consistent and acceptable case and has proved title and possession into the suit property at the time of filing of the suit, the second defendant, who claimed title under Ex.A.5 has not proved that the eastern part of the property, which is shown as 'A' schedule to the plaint, was covered under Ex.A.5. The trial court has discussed the evidence in extenso and has arrived at a correct conclusion that the plaintiff was entitled for declaratory relief in respect of the property described in 'A' schedule to the plaint and also for recovery of possession.

But, the first appellate court, without proper perception of the evidence available, has taken an erroneous view and has dismissed the suit, which has got to be set aside and the judgment of the trial court has got to be restored.

10. Accordingly, the judgment of the first appellate court is set aside. The judgment of the trial court is restored and the suit is decreed. This second appeal is allowed, leaving the parties to bear their costs.

Index : Yes
Internet : Yes
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To
1. The Subordinate Judge, Srivilliputhur
2. The Principal District Munsif, Srivilliputhur
3. The Record Keeper, VR Section,
High Court, Madras